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No. 95-336

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN STEWART AND VINCENT GRECO,

Petitioners,

V.

CHARLES CHRISTY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the individual defendants are permitted to appeal the District Court's determination that they were not entitled to qualified immunity because the pretrial record was sufficient to establish a genuine issue of fact for trial.

2. Whether the Third Circuit correctly determined that the Pennsylvania Turnpike Commission's entitlement to Eleventh Amendment immunity must, like other affirmative defenses, be established by the party asserting it.

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No. 95-336

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PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN STEWART AND VINCENT GRECO

Petitioners,

vs.

CHARLES CHRISTY

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Charles Christy, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's opinion below which affirmed the District Court's denial of summary judgment on the issues of Eleventh Amendment and qualified immunity. The opinions of the District Court and Third Circuit are reported at 845 F. Supp. 1107 (E.D.Pa. 1994) and 54 F.3d 1140 (3d Cir. 1995) and are reprinted in the petition for certiorari at Appendices A and B, respectively.

JURISDICTION

Respondent submits that under *Johnson v. Jones*, 115 S.Ct. 2151 (1995), this Court does not have jurisdiction to review the order in question insofar as it relates to the denial of qualified immunity because the District Court found that the pretrial record was sufficient to establish a genuine issue of fact for trial.

STATEMENT OF CASE

Procedural History

Respondent, Charles Christy ("Christy"), commenced this action on June 22, 1993 by filing a complaint against the Pennsylvania Turnpike Commission (the "Commission"), Robert Brady ("Brady"), John Stewart ("Stewart"), Vincent Greco ("Greco") and John Boschi ("Boschi") alleging, inter alia, that he was not promoted to the position of paint crew foreman by the petitioners for partisan political reasons in violation of his First Amendment rights. On October 27, 1993, after limited discovery, Christy sought leave to amend his complaint to add eleven additional defendants (each of whom was also directly and influentially involved in the deprivation of Christy's constitutional rights), assert additional claims based on his failure to receive a second promotion and to modify, sharpen and/or delete certain other claims. On November 12, 1993, the petitioners filed motions for summary judgment asserting Eleventh Amendment immunity on behalf of the Commission, qualified immunity on behalf of the individuals and lack of any genuine issue of material fact as to each petitioner.

Christy was granted leave to amend his complaint on February 3, 1994 and the District Court denied petitioners' motions for summary judgment, in toto, on March 10, 1994. The petitioners appealed the District Court's denial of their motions for summary judgment to the Third Circuit on the grounds of Eleventh Amendment and qualified immunity. The Third Circuit initially found that the Commission was not entitled to Eleventh Amendment immunity and correctly dismissed the individual petitioners' appeal on qualified immunity grounds for lack of jurisdiction because the District Court ruled it could not find qualified immunity based on the facts at summary judgment. *Christy v. Pennsylvania Turnpike Commission*, 1995 WL 127077, *1 n.4 (3d Cir. March 27,1995), on rehearing, 54 F.3d 1140 (3d Cir. 1995).

On petition for rehearing, the original opinion was vacated and a new opinion issued by the panel without further argument or briefing which affirmed the District Court's denial of petitioners' motions for summary judgment based on both sovereign and qualified immunity grounds. The Third Circuit addressed the issue concerning its jurisdiction to rule on the issue of qualified immunity where the pretrial record contains genuine issues of material fact, as follows:

> The plaintiff contends that we lack jurisdiction to entertain this argument because the district court's decision was based on factual rather than legal grounds. We do not agree. We will not address this question at length, however, because it appears likely that the Supreme Court will soon resolve this question in *Johnson v. Jones*, No. 94-455, 1995 WL 243454 (Argued April 18, 1995).

Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1143-44 n. 4 (3d Cir. 1995). A second petition for a rehearing was considered by the Chief Judge and thirteen Circuit Judges and ultimately denied apparently without any Circuit Judge voting in favor of a rehearing. See Opinion reprinted in the petition for certiorari at Appendix C.

Several weeks after the Third Circuit entered its revised opinion, this Court rendered its unanimous decision in *Johnson*, holding that " ... a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 115 S.Ct. at 2159. Further review of the district court's denial of petitioners' qualified immunity defense because of the existence of genuine issues of material fact for trial is precluded by this Court's decision in *Johnson*.

Factual Background

The Commission is an autonomous independent agency created in 1937 by Act 1937-211 to construct, finance, operate and maintain a toll highway in the Commonwealth of Pennsylvania.[1] The Commission receives most of its funds from sources other than the Commonwealth of Pennsylvania which has effectively disclaimed responsibility for any obligations that the Commission may incur.

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[1] See, Pa. Stat. Ann. tit. 36, §652a et seq. (1961). Act 37-211 has been subsequently amended on several occasions, most recently by Act 1985-61. See, 36 Pa. Cons. Stat Ann. §651.1 et seq. (1995).

Brady is one of five Commissioners who are responsible for the operations of the Commission. Stewart (Asst. Deputy Exec. Director-Maintenance), Greco (Division Superintendent) and John Boschi ("Boschi") (Deputy Exec. Director-Maintenance) are employed by the Commission as senior level managers. Although not a party to this appeal, Boschi's separate motion for summary judgment was also denied by the District Court and affirmed by the Third Circuit on consolidated appeal.

Christy has been employed by the Commission as a highly skilled mechanic for over 18 years. According to his superiors, he has a fine reputation and would have been selected to be the Division's mechanic instructor over all other mechanics even if seniority was not a factor. Christy possesses the unique ability to operate, repair and maintain virtually all equipment utilized by the maintenance department, including all equipment utilized by the line painting crews. Christy has also directly supervised Commission personnel.

In early 1993, Christy sought to be promoted to the position of paint crew foreman and was interviewed for the position along with several other candidates (including Sean Pilecki who ultimately received the promotion) by Stewart, Greco and Boschi. Under Policy Letter 65, Stewart, Greco and Boschi were responsible for interviewing the candidates and recommending the top 3-6 candidates to the personnel committee who in turn recommended the most qualified candidate to the Brady who together with the other Commissioners decided to promote Sean Pilecki instead of Christy.

Stewart and Greco claim that they " ... had nothing to do with the filling of the paint crew foreman vacancy after interviewing Christy and recommending him as one of the three most qualified candidates." Petition at 3. Brady claims that " ... his only role in this case was to approve on a "yes or no" basis the recommendations of the Personnel Committee for the paint crew foreman ... ." Petition at 4. The record however, indicates that each petitioner was materially and actively involved in the deprivation of Christy's First Amendment rights.

Several weeks after the decision not to promote Christy was made, Christy confronted Boschi in the old ambulance room at the Devault maintenance facility and asked why Sean Pilecki was chosen to be the paint crew foreman instead of him. Boschi admitted to Christy that:

- Christy did not receive the promotion because he did not support Brady (Democratic Chairman of Philadelphia) or any political officials supported by him and without political support Christy would not receive a promotion.

- Sean Pilecki was awarded the position not on the basis of merit but because he and his father were politically aligned with Brady and elected officials supported by him.

- Christy should have his father use his political affiliation with Senator Fumo to have Brady create an asst. foreman position for Christy and all that was needed was a phone call from Brady awarding the position

to Christy.

- Sean Pilecki was Brady's man for the job and we went along with it and made sure Sean got the job.

- Christy and not Sean Pilecki was the most qualified candidate for the job.

See, Christy Affidavit at RA-2, 3. Christy's recollection of his conversation with Boschi was corroborated by Jim Sperduti, another Commission employee who was standing next to a partially opened door only a few feet away from Christy and Boschi. See, Jim Sperduti Statement at RA-15.

In order to promote Sean Pilecki for partisan political reasons, the interview and promotional system had to be manipulated in order to bring about the desired result. Brady, Stewart, Greco and Boschi were each involved in that manipulation.

Christy's interview for the position by Stewart, Greco and Boschi was, at best, perfunctory, lasting only 13 minutes. See, Christy Affidavit at RA-1. They asked very few relevant questions and their inquiry into Christy's qualifications was minimal. Id. The outcome of the interview did not matter because Boschi, Stewart and Greco were already aware that Brady's sponsored candidate, Sean Pilecki, would receive the promotion and they were merely papering the file.

Stewart, Greco and Boschi did more than just paper the file - they submitted false and materially misleading documentation to (and withheld other documentation from)

the personnel committee to ensure that Brady's sponsored candidate received the promotion. The Recommendation Memo to the personnel committee prepared by Stewart, Greco and Boschi summarizing the qualifications of the top three candidates overstated the qualifications of Sean Pilecki and understated the qualifications of Christy. See, Recommendation Memo at RA-7.

Lou Sperduti (the outgoing paint crew foreman who had previously been the direct supervisor of both Sean Pilecki and Christy) told Christy that he was more qualified than Sean Pilecki and should have been promoted to paint crew foreman. See, Christy Dep. at RA-13. Michael Haney (then Lou Sperduti's immediate supervisor) told Christy that he should have received the promotion instead of Sean Pilecki. See, Christy Dep. at RA-14.

The Recommendation Memo falsely stated that Christy lacked supervisory experience and had limited administrative experience. Lou Sperduti testified that Christy had supervisory experience and administrative experience. See, Lou Sperduti Dep. at RA-17, 18.

The Recommendation Memo falsely stated that Sean Pilecki supervised line painting operations in the absence of the paint crew foreman during the last three years. Lou Sperduti stated that Sean Pilecki provided no direct supervision of the paint crew. See, Lou Sperduti Dep. at RA-21, 22. Finally, even Sean Pilecki admitted that "[he] was not a supervisor at all".

While Sean may have performed certain record keeping tasks in Lou Sperduti's absence, he did not supervise line painting operations. In fact, Sean Pilecki had

absolutely no supervisory experience whatsoever.

Stewart, Greco and Boschi each provided conflicting testimony concerning Christy's qualifications. In their answer to Christy's complaint paragraph 16, each of them denied that:

> Christy met all of the job qualifications and was particularly well qualified for the position of Paint Crew Foreman because he had extensive knowledge of the equipment involved and in the work performed by the highway maintenance crew, had the ability to repair the equipment and also had prior experience in training and supervision of employees.

Boschi and Stewart each stated that Christy and Sean Pilecki were "equally qualified". See, Boschi Dep. at RA-9 and Stewart Dep. at RA-11. When asked who he felt was the most qualified, Greco stated that he felt they were all qualified although he hoped that Sean Pilecki would receive the promotion. See, Greco Dep. at RA-10. Boschi later told Christy and Lou Sperduti that he thought Christy was the best man for the job. See, Christy Dep. at RA-12 and Lou Sperduti Dep. at RA-24.

The foregoing evidence (the existence of which was not disclosed by the petitioners) when viewed in a light most favorable to Christy together with the reasonable inferences which maybe drawn therefrom leads only to the conclusion that there are material issues of fact concerning the true nature and extent of each petitioners' involvement in the failure to promote Christy for partisan political

reasons in violation of his First Amendment rights. Petitioners' assertion that their are no genuine issues of material fact in support of Christy's claims is false, misleading and a gross mischaracterization of the record in this case.

SUMMARY OF THE ARGUMENT

I. Under *Johnson v. Jones*, 115 S.Ct. 2151 (1995), the District Court's denial of petitioner's motion for summary judgment on the issue of qualified immunity was based on a determination that genuine issues of material fact existed for trial and, therefore, is not appealable.

II. The Third Circuit correctly applied the standards reiterated by this Court in *Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct. 394 (1995) and found that the Commission was not entitled to Eleventh Amendment immunity.

REASONS FOR DENYING THE WRIT

In an effort to obtain review by this Court, the petitioners have mischaracterized the nature of the qualified immunity question presented for review. Petitioners suggest that analysis applied by the District Court and the Third Circuit was inconsistent with this Court's qualified immunity decisions. Petition at 8. This suggestion is incorrect and under *Johnson* this Court lacks jurisdiction to even review the District Court's decision denying petitioners' qualified immunity because genuine issues of material fact exist for trial.

The Third Circuit did not decide the Eleventh Amendment immunity issue presented by this case until after *Hess* had been decided and obviously its decision conformed and applied the standards established by this Court. Moreover, the facts in this proceeding are sufficiently unique that their precedential value is likely to be minimal.

I. THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF QUALIFIED IMMUNITY WAS BASED UPON A FACTUAL DETERMINATION AND THEREFORE NOT APPEALABLE. *JOHNSON V. JONES*, 115 S.Ct. 2151 (1995).

The qualified immunity issue presented to the District Court was a factual issue - did petitioners participate in the denial of Christy's First Amendment rights by denying him a promotion for partisan political reasons. In their Petition for Writ of Certiorari, petitioners repeat their fact-based claim of non-participation. Petitioners allege that:

> "Petitioners Greco and Stewart had nothing to do with the filling of the paint crew foreman vacancy after interviewing Christy and recommending him as one of the three most qualified candidates...Petitioner Robert Brady is the only Commissioner originally named as a Defendant in this case; his only role in this case was to vote to approve on a 'yes or no' basis the recommendations of the Personnel Committee..."

Petition at 3-4.

Petitioners' claim of non-participation was correctly recognized by the District Court as a factual issue separate and apart from the question of whether the constitutional right claimed by Christy was clearly established. The constitutional right at issue was the right of free speech and free association and the alleged deprivation was the denial of a promotion by a governmental agency because of political affiliation or lack thereof.

The District Court's resolution of the "established right" issue was succinct and incontrovertible. The District Court stated:

> "Here, the essential thrust of Plaintiff's case is that his first amendment rights to free speech and free association were violated by the defendants by their failure to promote him for purportedly unlawful partisan political reasons. It is therefore fairly obvious that Mr. Christy is indeed inserting the violation of a constitutional right.
>
> Moreover, and as discussed below, it has long been established that conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition unless it can be shown that party affiliation is an acceptable criterion for some type of government employment or that an employee's private political beliefs would interfere with the discharge of his public duties... In 1990, in deciding *Rutan v. Republican Party of Illinois* ..., the U.S. Supreme Court extended this rationale to

> apply with equal force to promotional decisions thereby prohibiting partisan or political considerations from having any influence in the promotional process. Again, it is clear that this was the prevailing state of the law in 1992 and 1993 when the employment decisions at issue in this case were made."

Petition at 13a-14a.

Having determined that the constitutional right asserted was clearly established at the time of the challenged hiring decision, the District Court then reviewed the record to determine whether there was a genuine issue of material fact as to petitioners' participation in the failure to promote Christy for partisan political reasons. The District Court stated:

> "Furthermore, it is evident from the Turnpike Commission's Policy Letter... and from the deposition testimony of John Boschi..., Vincent Greco... and John Stewart..., that the Defendants like all others involved in the promotion process, had been specifically apprised of the Supreme Court's holding in *Rutan*. Inasmuch as our review of the record in this case reveals that Messrs. Boschi, Greco and Stewart admit that they were responsible for interviewing, assessing and 'grading' candidates for the position(s) for which Mr. Christy applied, and that Mr. Brady, together with his fellow commission members, voted to approve the appointment

> of Sean Pilecki, it is clear that defendants were all involved in the promotions process in this case. Accordingly, viewing all of the evidence in this matter in light of the foregoing precedent and in the manner most favorable to the plaintiff, we are unable to find as a matter of law that these defendants did not violate Mr. Christy's clearly established rights or that they are entitled to the cloak of qualified immunity from this suit. The motions for summary judgment on the basis of qualified immunity from suit must therefore be denied."

Petition at 14a-15a.

Having found a genuine issue of material fact as to petitioners' participation, the District Court then reviewed the record for evidence of political motivation behind petitioners action. The District Court found such evidence and described it as follows:

> "We next evaluate whether the record evidence demonstrates that Plaintiff was engaged in constitutionally protected conduct and whether that conduct was a substantial or motivating factor in the Commission's decision to promote another candidate. Again viewing the record in the light most favorable to the plaintiff, the testimony and affidavits of Mr. Christy himself, the affidavit and deposition of James Sperduti and the deposition testimony of John Boschi reflect that while the plaintiff had been active in

> Democratic party politics in Chester County, the only way he could get a promotion with the Commission was by aligning himself with defendant Robert Brady and Philadelphia County Democratic State Senator Vincent Fumo and pressuring those individuals to promote or create a higher, better paying position for him. This evidence is insufficient indicia that Mr. Christy was engaged in exercising his first amendment right to not associate or align himself with Mr. Brady and/or Senator Fumo and that his decision to not so associate or align himself with those individuals was a substantial or motivating factor in the Commission's decision to instead promote Sean Pilecki who, along with his father, was apparently so aligned."

Petition at 7a-18a. In addition, the District Court reviewed the interview and evaluation process and found it to be somewhat "skewed". Petition at 18a.

Petitioners claim to qualified immunity based on allegations of non-participation is analogous to the claims made by petitioners in *Johnson v. Jones*, 115 S.Ct. 2151 (1995), recently decided by this Court on June 12, 1995. In *Johnson*, three police officers who were sued for excessive force in making an arrest claimed that they had not beaten the plaintiff and were not present while others did so. The district court denied their motion for summary judgment based upon qualified immunity because of deposition testimony that the three officers were present at the time of plaintiff's arrest and were in or near the room where

plaintiff claimed to have been beaten. The police officers appealed on the basis that the record did not support a finding that there was a genuine issue of material fact as to their participation.

In *Johnson*, this Court held that where the defense of qualified immunity is based upon a factual assertion of non-participation, such claim is too deeply entwined with the underlying merits of the case to qualify for interlocutory appeal. This Court stated:

> "The upshot is that, compared with *Mitchell*, considerations of delay, comparative expertise at trial and appellate courts, and wise use of appellate resources, argue in favor of limiting interlocutory appeals of 'qualified immunity' matters to cases presently more abstract issues of law. Considering these 'competing considerations,' we are persuaded that 'immunity appeals...interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law.'"

115 S.Ct. at 2158.

In both *Johnson* and the instant case, there are no issues of law. The constitutional right claimed by Christy was well defined through the triumvirate of *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980), *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729 (1990). The only matter at issue was the purely factual question of petitioners' participation in the decision to deny Christy's promotion for partisan political reasons.

Mindful of Justice Breyer's admonition that "questions about whether or not a record demonstrates a single 'genuine' issue of fact for trial, if appealable, can consume inordinate amounts of appellate time",[2] Christy has not engaged, in this Answer, in a lengthy discussion of the evidentiary support in the record which establishes a genuine issue of material fact as to petitioners' participation. It is abundantly clear from this Court's holding in *Johnson* that it is not the function of an appellate court to second guess or even review a district court's denial of a motion for summary judgment on the issue of qualified immunity where that denial is based upon a factual determination of the defendant's participation in the alleged deprivation of a constitutional right.

Because *Johnson* had been argued but not yet decided when the Court of Appeals issued its Opinion, the Court of Appeals did not address at length of the question of whether the district court's denial of summary judgment on the qualified issue immunity was an appealable order. In a footnote, the Court of Appeals stated:

> "The individual defendants argue that the district court erred in denying their motions for summary judgment based on qualified immunity. The plaintiff contends that we lack jurisdiction to entertain this argument because the district court's decision was based on factual rather than legal grounds. We do not agree. We will not address this question at length, however, because it

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[2] *Johnson*, 115 S.Ct. at 2158.

> appears likely that the Supreme Court will soon resolve this question in *Johnson v. Jones* ..."

Petition at 27a.

Nevertheless, the Court of Appeals recognized that the issue was essentially a factual issue and affirmed the district court's decision that there was sufficient evidentiary support in the record to establish a genuine issue of material fact as to petitioners' participation in the alleged violation of Christy's First Amendment rights . The Court of Appeals stated in the same footnote:

> "While we believe that we have jurisdiction to entertain individual defendants' qualified immunity argument, we affirm the district court's decision on the merits. When the disputed facts are viewed in the light most favorable to Christy, as they must be at summary judgment, we agree that the individual defendants were not entitled to qualified immunity."

Petition at 27a.

Petitioners will have their opportunity at trial to persuade the jury that they did not participate in the denial of Christy's promotion for partisan political reasons in violation of Christy's constitutionally protected right to free speech and free association. However, having failed to persuade the District Court that there are no genuine issues of material fact as to their actual conduct, petitioners may not now pursue an interlocutory appeal and seek appellate

review of the District Court's denial of their motion for summary judgment on the qualified immunity issue.

II. THE THIRD CIRCUIT FOLLOWED *HESS V. PORT AUTHORITY* AND CORRECTLY FOUND THAT THE COMMISSION WAS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

On October 24, 1994, the Third Circuit initially delayed the resolution of this action by entering the following Order:

> IT IS HEREBY ORDERED that the Court has determined to c.a.v. the above matter pending the decision of the United States Supreme Court in *Hess v. Port Authority Trans-Hudson Corporation*, No. 93-1197.

After this Court decided *Hess*, the Third Circuit correctly applied the standards reiterated by this Court in *Hess* and found that the Commission was not entitled to Eleventh Amendment immunity.

1. The Third Circuit Correctly Determined That The Commission's Entitlement to Eleventh Amendment Immunity Must, Like Other Affirmative Defenses Be Established By the Commission.

The Commission asserts that it was improper for the Third Circuit to impose upon it the burden of establishing its entitlement to Eleventh Amendment immunity. Petition at 25. According to the Commission, Christy, as the party

asserting jurisdiction, bears the burden of establishing such jurisdiction. Id. The Commission, however, was unable to cite any cases which support its position. The two cases cited by the Commission did not involve Eleventh Amendment immunity issues at all.

The Third Circuit adopted the approach of the Ninth Circuit in *ITSI TV Productions v. Agricultural Associations*, 3 F.3d 1289 (9th Cir. 1993) and correctly found that:

> Because Eleventh Amendment immunity can be waived by a party, or forfeited through non-assertion, it does not implicate federal subject matter jurisdiction in the ordinary sense. Id. at 1291. We agree with the Ninth Circuit that "whatever its jurisdictional attributes, [Eleventh Amendment immunity] should be treated as an affirmative defense[,]" and "like any other such defense, that which is promised by the Eleventh Amendment must be proved by the party that asserts it and would benefit from its acceptance." Id. We also agree with the Ninth Circuit that considerations of fairness support this conclusion.

Christy, 54 F.3d at 1144 (citing *ITSI TV Productions*). The Third Circuit's decision to impose the burden of proof on the Commission is entirely consistent with this Court's decision in *Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct. 394 (1995).

This Court addressed the issue of burden of proof in *Hess* as follows:

> We then set out a general approach: we would presume that the Compact Clause agency does not qualify for Eleventh Amendment immunity "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose".

Id. at 402 (citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 99 S.Ct. 1171, 1177 (1979)). The presumption is that the state agency, in this case, the Commission, does not qualify for Eleventh Amendment immunity. It is therefore up to the Commission to rebut this presumption by presenting sufficient evidence to show that it is in fact entitled to Eleventh Amendment immunity. The analysis is the same irrespective of whether the agency is a single state agency or a bistate agency.

2. There Was Sufficient Evidence In the Record To Support the Third Circuit's Decision that the Commission Was Not Entitled to Eleventh Amendment Immunity.

The parties each fully briefed and presented a significant amount of evidence in support of their respective positions on the issue of Eleventh Amendment immunity. The Third Circuit after reviewing the arguments made by the parties and applying the criteria set forth by this Court

in *Hess*, correctly found that the Commission was not entitled to Eleventh Amendment immunity. *Christy*, 54 F.3d at 1150.

In this case, as in *Hess*, the indicators of immunity (liability of the state, status under state law and autonomy) did not all point in the same direction. This Court found in *Hess* that when the indicators of immunity point in different directions, the Eleventh Amendments twin reason for being (states integrity and the prevention of federal court judgments paid from state treasuries) remain the prime guide. *Hess*, 115 S.Ct. at 404. Specifically, this Court summarized the analysis as follows:

> If the expenditures of the enterprise exceed receipts, is the state in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" - both legally and practically - then the Eleventh Amendment's core concern is not implicated.

Id. at 406. In *Hess*, this Court found that the Port Authority did not qualify for Eleventh Amendment immunity because it was financially self-sufficient, generated its own revenues and paid its own debts. Id.

The Commission, like the Port Authority is financially self sufficient, receives most of revenue from sources other than the Commonwealth of Pennsylvania and pays its own obligations. In *Spector v. Commonwealth*, 341 A.2d 481 (1975), the Pennsylvania Supreme Court held that the Commission was not an arm of the Commonwealth and was not entitled to sovereign immunity. After examining the legislative acts creating the Commission and defining its

purposes and powers, the Pennsylvania Supreme Court determined that:

> There is, of course, no doubt that the Commonwealth itself could have constructed the Turnpike in the same manner that it constructs and operates its State highways. Had it done so, the State's immunity from suit would encompass actions arising in connection with the Turnpike. But the Commonwealth itself did not build this highway and does not maintain it. The legislature created this separate body and at the same time disclaimed any responsibility on the part of the Commonwealth for liabilities for which it, the Commission, might incur. It is clear that the Commission is not an integral part of the Commonwealth, and cannot share in the attributes of sovereignty which inhere in the state.

341 A.2d at 491. Shortly after the *Spector* decision, the Pennsylvania legislature passed a sovereign immunity statute which legislatively conferred on upon independent agencies such as the Commission, that which they otherwise lacked, namely, immunity from suit in state court. However, the Third Circuit correctly found that the legislature (which did not significant amend the legislative acts governing the Commission) did not conclusively repudiate *Spector's* conclusion that the Commission was not an integral part of the Commonwealth and does not share in the attributes of sovereignty inherent in the state. *Christy*, 54 F.3d at 1149.

The Commission was simply unable to establish that (i) a judgment against it would be tantamount to a judgment against Pennsylvania, (ii) it lacked sufficient resources to pay a judgment against it or (iii) Pennsylvania would be under any obligation to satisfy a judgment against the Commission. *Christy*, 54 F.3d at 1148. A remand to the District Court for additional fact finding would be pointless.

CONCLUSION

Evidently, petitioners do not believe that it is possible for the District Court, the panel or the Third Circuit en banc to have ruled against them had they really understood the law and petitioners' arguments. Apparently, petitioners believe that if they repeat their arguments enough times, the District Court (which is currently considering renewed motions for summary judgment on behalf of all defendants), the panel or the Third Circuit en banc will eventually agree with them. However, petitioners have identified no legal basis for their entitlement to repeated bites at the same apple. Quite simply, the petitioners were wrong when they first made these arguments and they are still wrong.

Accordingly, for all of the foregoing reasons, petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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